

IN THE MATTER OF

THE ONTARIO HUMAN RIGHTS CODE
R.S.O. 1980, c. 340

AND IN THE MATTER OF

A complaint by Mr. Gladstone Leslie Scott of Willowdale,
Ontario alleging discrimination in employment by Foster
Wheeler Limited, St. Catharines, Ontario.

BOARD OF INQUIRY

PROFESSOR IAN A. HUNTER

REMEDY

APPEARANCES:

Mr. Michael Bader	Counsel
	Ontario Human Rights Commission
Mr. Richard J. Nixon	Counsel
	Foster Wheeler Limited

Hearings on Remedy were held in Toronto, Ontario on November 4,
5, 11 and 12, 1985.

REMEDY AND ORDER

On May 17, 1985 I issued my Decision in this case holding that Foster Wheeler Limited had discriminated against the complainant, Mr. Gladstone Leslie Scott contrary to the Ontario Human Rights Code.

Section 19(b) of the Code empowers a Board of Inquiry to "...order any party who has contravened this Act to do any act or thing that, in the opinion of the Board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor."

Hearings took place in Toronto on November 4, 5, 11 and 12 at which time I heard viva voce evidence and submissions of both counsel as to the appropriate order to redress the act of discrimination suffered by Mr. Scott at the hands of Foster Wheeler.

There is ample authority that such an order should compensate a complainant for both special (i.e., lost wages and benefits) and general (i.e., pain and suffering, humiliation, injury to feelings and reputation) damages. See Torres v. Royalty Kitchenware Limited [1982] 3 C.H.R.R. D/176 at D863 for a comprehensive review of the cases and principles of assessment.

As to the purpose to be served in assessing damages under section 19(b) I repeat what I wrote in Bruton and McInnis v. M.H.G. International Limited and William Colborne [1983] 4 C.H.R.R. D1173 at D1176: "The purpose of an order as I conceive it, should be to restore the complainants, so far as that is possible, to the position they would have been in but for the illegal and discriminatory act." I do not believe it is the function of a Board of Inquiry to assess punitive or aggravated damages.

Special Damages

Mr. Scott was very anxious to go on the Jamaican project. Had he not been discriminated against because of his race and colour he would have gone. Had he gone, he testified that he would have worked as much and as long as possible because he needed the money. I accept that evidence.

In assessing special damages, I intend to use the experience of the four welders--Messrs. Ribiero, Valero, Masri and Anderson--as the basis for several calculations. In one respect, namely the duration of the employment which Mr. Scott could reasonably have anticipated, I intend to use Mr. Ribiero as the standard for compensation. Mr. Ribiero stayed on the Jamaican project until the final week, September 25, 1982; that is, he worked 27 consecutive weeks. I accept Mr. Scott's

evidence that he would have stayed as long as possible on the project and I believe that the fairest approach is to use the 27 week period as the outside limit on compensation.

Lost Wages

The four welders (Ribiero, Valero, Masri and Anderson) earned a total of \$104,433.92 in wages. The four men worked a total of 72 weeks. The average weekly wage was \$1,450.47. Mr. Scott could quite possibly have made more than this by working a higher number of night shifts for which a shift premium of \$3.32 per hour was paid. Nevertheless, I am satisfied that the average weekly wage is the appropriate figure to use.

Consequently, Mr. Scott's entitlement to lost wages is \$1,450.47 per week for a period of 27 weeks = \$39,162.69.

Mitigation

A complainant is under a duty to take all reasonable steps to mitigate his damages; cf. Torres, op cit. at D/871ff. The evidence led before me confirms that Mr. Scott made a concerted effort to find welding employment from March 18, 1982 onwards. The evidence also confirmed that Mr. Scott was offered a job in the Alberta Tar Sands on the Suncor project with Foster Wheeler on June 3, 1982.



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Mr. Scott testified that Bill Ritchies phoned him and told him that there was a job for "two weeks." Mr. Scott said that he would consider it. Approximately one hour later Mr. Scott called Mr. Ritchies back and explained that he had decided not to take the job because he was anticipating a 12 week job with Ontario Hydro in Toronto. Also, Mr. Scott's name was on the Union out-of-work list and he did not wish to jeopardize his position on the list for the sake of a two week job in Alberta.

Mr. Wronski testified that he told Mr. Ritchies to contact Mr. Scott because he knew that Mr. Scott had a current Foster Wheeler welding ticket. Mr. Wronski testified that the probable duration of the Tar Sands job was "6-8 weeks."

Mr. Bill Ritchies initially testified that Mr. Wronski told him the job was for "six to seven" weeks; subsequently, he changed that to "six to eight weeks." Mr. Ritchies testified that when he actually phoned Mr. Scott he told him that the probable duration was "five to six weeks" because he knew that out-of-province welders would be the first to be let go. When Mr. Scott rang back and declined the offer, Mr. Ritchies testified that he (i.e., Scott) said he didn't think it was worth his while to go out to Alberta for a two to three week job thereby jeopardizing his chance at the Hydro job. Mr. Ritchies made no response to correct Mr. Scott's apparent misapprehension that the job was only for two to three weeks. Finally, it should

be noted that between Mr. Ritchies' call to Mr. Scott and Mr. Scott's reply, Mr. Scott rang Mr. Len Marino, the human rights officer investigating the case, to inquire whether accepting the job offer would jeopardize his complaint. Mr. Marino made a contemporaneous note of this telephone conversation and his note indicates that the duration was two to three weeks.

If I were required to determine precisely what Mr. Scott was told as to the probable duration of the project, I would prefer his evidence to that of Messrs. Wronski and Ritchie. I do not have to make that choice. Either way, I am satisfied that Mr. Scott's decision not to accept the Alberta Tar Sands project was a reasonable one. First, he was on the Union out-of-work list and he would have lost his ranking by accepting the out-of-province job. Second, he had a real expectation of a job with the Ontario Hyrdo much closer to home and for a longer duration. Third, he had an outstanding complaint against Foster Wheeler. Even so, I am satisfied that Mr. Scott would have accepted any reasonable job offer, from Foster Wheeler or from any other employer, of longer duration than the anticipated Ontario Hydro job. Consequently, the June 3 job offer does not constitute an unreasonable refusal by Mr. Scott to mitigate his damages.

Between the act of discrimination (March 18, 1982) and the cutoff date for compensation (September 25, 1982)

Mr. Scott did mitigate his losses by accepting all employment which came his way. In that time he worked for four different employers: Frankel Steel (June 29-July 28); Toronto Iron Works (August 8-September 9); E.S. Fox Limited (September 14) and Plibrico Canada Limited (September 15-September 20). Through those periods of employment he earned a total of \$11,356.21. This amount is to be deducted from the wages he would have earned on the Jamaican project.

Consequently, special damages for lost wages are \$39,162.69 minus \$11,356.21 = \$27,806.48.

Pension

Mr. Scott lost Company pension plan contributions of \$1.45 per hour work. The average hours worked on the Jamaican project by the four welders was 1,323 hours.

Mr. Scott is entitled to lost pension plan contributions in the amount of $\$1,323 \times \$1.45/\text{hour} = \underline{\$1,918.35.}$

Health and Welfare Plan

The Company paid 50¢ per hour worked into a health and welfare plan for each employee.

Even though Mr. Scott continued to receive health and welfare benefits for the period he was unemployed (thanks to accumulated "credits" in the hourly bank), I am satisfied from the evidence that he was denied a benefit, pursuant to this plan, a benefit which he should have recieved. Mr. John Schel, who is a trustee of the plan, was uncertain whether Mr. Scott could use a lump sum award to, in effect, repurchase credits in the plan. Nevertheless, I am satisfied that he is entitled to lost health and welfare benefits to be calculated $1,323 \text{ hours} \times 50\text{¢ per hour worked} = \underline{\underline{\$661.50}}$.

Expense Money

In Jamaica the men were paid a weekly expense allowance (initially \$150 Jamaican per week rising to \$210 Jamaican per week in June 1982). Initially, I was inclined to include a sum representing lost expense allowance. Mr. Wronski testified that the men could do anything they wanted with the expense money, even bank it. However, on reflection, I am persuaded that I ought not to include this since (a) the allowance came not from Foster Wheeler but from the Jamaican contractor; and (b) Mr. Scott did not incur the expenses (lunches, Island transportation, sundries) which the allowance was primarily intended to cover.

Legal Fees

Mr. Scott incurred over \$5000 in legal fees retaining the services of a lawyer in Jamaica and in Toronto. He claimed recovery by way of special damages.

I am not prepared to include such costs. The Ontario Human Rights Commission provides investigation, conciliation, and even legal services, to complainants without cost. Mr. Scott was entitled to decide that he preferred separate representation. But he is not entitled to have the respondent pay for this. I should add that, on the second day of the hearing, Mr. Scott dismissed his Toronto lawyer and, for the remaining 17 days of hearings, was very ably represented by Commission counsel, Mr. Bader.

General Damages

Mr. Scott testified that the experience of discrimination was "one of the most devastating things that ever happened to me in my life", and that it affected relationships with his family and fellow workers. I believe his evidence. In the dozen or more Boards of Inquiry which I have conducted, I have never seen a complainant quite so crushed by the experience. Mrs. Scott testified that, since the incident, her husband has been suspicious, verging at times on paranoia.

In trying to determine an appropriate award of general damages I have considered not only the facts of the instant case but tried, however difficult it is, to make comparative factual evaluations with such cases as Torres, op. cit., Rand v. Sealey Eastern (1982) 3 C.H.R.R. D/938; Cameron v. NelGor Castle (1984) 5 C.H.R.R. D/2170; Mears et al. v. Ontario Hydro (1984) 5 C.H.R.R. D/1927; Hendry v. Liquor Control Board of Ontario (1980) 1 C.H.R.R. D/160; Phalen v. Solicitor General for Canada (1981) 2 C.H.R.R. D/433. After considering these (and other) decisions, and acknowledging the inexact nature of such comparison, I have decided that the appropriate award of general damages should be \$4,500. This is substantially more than many of the human rights cases I have cited (which recognizes the very serious effect which the discriminatory act had on this particular complainant) and yet is substantially less than the highest award (Hendry, op. cit.) in which, it seems to me, a punitive element crept into the assessment.

Accordingly, the total of special and general damages to be awarded to the complainant is \$34,886.33.

Interest

Recent decisions have awarded interest on the total special and general damages. The appropriate date to commence interest is the date of service of the complaint which is

agreed between the parties to have been April 23, 1982. The prime interest rates for the appropriate years were: 1982--16%; 1983--11%; 1984--12%; 1985--10%.

The interest should not be compounded and the figures given represent partial years in 1982 and 1985.

1982 -- \$3,863.99.

1983 -- \$3,837.49.

1984 -- \$4,186.35.

1985 -- \$3,139.77.

Total interest awarded -- \$15,027.60.

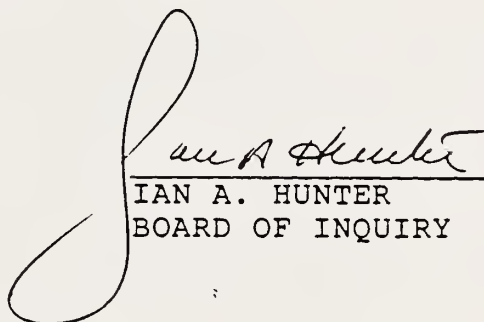
ORDER

This matter coming on for hearing before this Board of Inquiry constituted pursuant to the Ontario Human Rights Code, in the presence of counsel for the Commission and counsel for the respondent, upon hearing evidence adduced by the parties and what was alleged by the parties, and upon finding that the complaint was substantiated by the evidence and upon hearing submissions as to the appropriate award:

IT IS HEREBY ORDERED THAT:

The respondent Foster Wheeler pay to Mr. Gladstone Leslie Scott compensation in the form of special and general damages in the amount of \$34,886.33 and interest in the amount of \$15,027.60.

DATED at the City of London in the County of Middlesex this 18th day of November, 1985.


IAN A. HUNTER
BOARD OF INQUIRY

